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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER ALLEN STRAND, Defendant and Appellant.	G055291 (Super. Ct. No. 12WF0040) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed in part and remanded.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Christopher Allen Strand of three sex offenses. In a bifurcated proceeding, the trial court found true a prior strike and one prior serious felony conviction. The court sentenced Strand to state prison for 76 years to life, including imposing two five-year enhancements for the prior serious felony conviction pursuant to Penal Code section 667, subdivision (a).

On appeal, Strand contended the trial court prejudicially erred by sustaining the prosecutor's objection to questions his attorney asked two defense witnesses. He further claimed the prosecutor's misconduct in closing and rebuttal arguments impermissibly reduced the prosecution's burden of proof. Finding no reversible error, we affirmed the judgment.

The California Supreme Court granted Strand's request to expand the issues on review, granted review, and transferred the case to us with directions to vacate our decision and reconsider the matter in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.; Stats. 2018, ch. 1013 (SB 1393)), which, effective January 1, 2019, amends Penal Code sections 667 and 1385 to provide trial courts with discretion to strike or dismiss a section 667 prior serious felony conviction enhancement. The parties filed supplemental briefs and the Attorney General agrees SB 1393 applies retroactively to Strand's case and that remand for resentencing is warranted.

We will affirm the convictions, but remand the matter so the trial court may consider whether to strike or dismiss the Penal Code section 667, subdivision (a), enhancements.

I

FACTS AND PROCEDURAL BACKGROUND

Strand was charged in an amended felony information with committing lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a); counts 1 & 3; all further statutory references are to the Penal Code, unless otherwise stated) and committing a lewd act on a child between the ages of 14 and 15 and at least

10 years younger than Strand (§ 288, subd. (c)(1); count 2). Count 1 was alleged to have occurred between September 1, 2004 and November 7, 2008, count 2 was alleged to have occurred between November 8, 2008 and November 7, 2010, and both counts involved the same victim, C.S. Count 3 was alleged to have occurred between May 21, 1998 and May 20, 2001, and pertained to victim L.S. The complaint further alleged that Strand committed a sexual offense against multiple victims (§ 667.61, subds. (b), (e)(5)), he previously had been convicted of a sexual offense (§ 667.61, subd. (a)), and he had one prior "strike" conviction within the meaning of the Three Strikes law (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)) and one prior serious felony conviction (§ 667, subd. (a)(1)).

A. Prosecution case

Brooke S., who was 36 years old at the time of trial, testified she was 12 or 13 years old when she first met Strand, who lived on the same street as Brooke. They would engage in light conversation, and Strand gave her a pager number to contact him. In August 1994, when Brooke was 13, she snuck out of her house and met up with Strand.[1] Strand invited her to his room, where he showed her some jewelry and lingerie on his bed. Strand asked her to put on the lingerie, but she refused. They began kissing, and Strand asked Brooke if she "wanted to go all the way." She responded that she "didn't want to." Nevertheless, Strand asked her to take off her clothes, and had sexual intercourse with her. During the sex act, Strand ignored Brooke's pleas to stop and that he was hurting her, continuing the assault until he ejaculated.

L.S. the victim in count 3, was born in May 1988. Strand is her mother's ex-boyfriend. When she was in fifth grade, L.S. and her family lived with Strand in Anaheim. While they were living together, Strand told L.S. he thought tight red leather pants would look sexy on her. On one occasion, when L.S. and Strand were in the

[1] Strand, born in April 1964, was 30 years old at the time.

kitchen, Strand pulled out his penis and waved it around. On another occasion, when Strand's son Cory was visiting, Strand called L.S. and Cory into his room and asked them to watch pornography. The two children refused and left the room. During one of the family beach trips, Strand pulled down L.S.'s bathing suit bottoms to her ankles.

The following year, when L.S. was around 11 years old, her family and Strand moved to the Sunshine Inn in Cypress. While they were living at the inn, L.S. woke up one night to see Strand rubbing her leg. When L.S. asked Strand what he was doing, he replied, "What we have is more than what your mother and I could ever have." When L.S. told Strand to stop, he sat still for a minute before saying, "All I want is one kiss." After L.S. told Strand she would call her mother, Strand returned to his bed.

When L.S. was 12 years old, she went to live with Maryanna B., who became her guardian. After L.S. told Maryanna what Strand had done to her at the Sunshine Inn, Maryanna encouraged L.S. to report the incident to the police. Although L.S. was initially reluctant, on September 23, 2002, she went with Maryanna to the Cypress Police Department and reported the incident**.**

C.S., the victim in counts 1 and 2, testified that Strand is her biological father. She was born in November 1994, and began living with Strand when she was in fifth grade. C.S. testified Strand began sexually abusing her when she was in the fifth or sixth grade, and the last time he abused her was in her sophomore year in high school. C.S. testified that the abuse happened on multiple occasions during this time period. Strand would ask her to meet him in his room, take off her clothes and lick her vagina. Strand also attempted to have sexual intercourse with her on several occasions, but C.S. resisted by closing her legs and pushing him away. Strand offered C.S. things in exchange for sexual activity. He bribed her with clothes and an iPod, and stated he would let her go out with her boyfriend if she allowed him to sexually abuse her.

On one occasion, C.S. asked Strand what would happen if she told anyone about the abuse. He responded that no one would believe her, and having sex with him

was normal, stating, "I know other people who did this to their daughters." Nevertheless C.S. told several friends about the abuse, including Joanna L., Ashley G., M.B. and C.A., and her boyfriend Juan G. When C.S. told Juan in the summer of 2011, he replied that he was not surprised because he had seen Strand's picture on a website. Joanna, Ashley, C.A., M.B., and Juan all testified at the trial. They confirmed that C.S. had told them about Strand's molestation.

A week after C.S. told Joanna about Strand's abuse, Joanna's mother asked C.S. whether Strand was abusing her. C.S. replied that she had lied about the abuse. C.S. testified she told Joanna's mother she had lied because she was "scared of what would happen" and "didn't want anyone else knowing." In 2002, a social worker asked her if anyone had touched her private parts. She lied to the social worker and said, "No," explaining she lied because she was "embarrassed or disgusted" about the abuse.[2]

On September 20, 2011, C.S. disclosed Strand's sexual abuse to her mother, who drove C.S. to the Cypress Police Department, where C.S. reported the abuse. C.S. explained she decided to tell her mother about the abuse because she had a recent fight with her father. During that incident, C.S. was sitting on the couch when Strand placed his hand on her legs. When she slapped his hand off, he responded, "You're not acting like my daughter anymore," and called her a "bitch." C.S. angrily left the room.

B. Defense case

C.S.'s mother testified she never observed any abuse, and believed Strand and C.S. had a loving relationship. She heard about Strand's abuse for the first time on September 20, 2011. She also testified she purchased an iPod for C.S. for Christmas 2011. C.S.'s brother Cory also testified he never saw Strand physically abuse C.S. He further testified that neither C.S. nor L.S. ever disclosed to him any abuse by Strand.

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[2] C.S. was interviewed by another social worker in 2004. During that interview, she also denied the existence of any sexual abuse.

Cory could not recall Strand pulling down L.S.'s bathing shorts, and he denied Strand ever asked him and L.S. to watch pornography.

Donna Barnes testified she began dating Strand in 2010, and lived with him, C.S. and Cory, until Strand was arrested in September 2011. Barnes never observed Strand touch C.S. in an inappropriate or sexual manner. Barnes and C.S. did not have a good relationship. On numerous occasions, Barnes observed C.S. acting rebelliously, not doing her chores or homework. C.S. would argue with her father and lied to him. C.S. wanted to live somewhere else, and mentioned moving in with her mother or her boyfriend Juan. Around September 2011, C.S. began spending more time with her mother.

Misty Dever testified she dated Strand from 2007 to 2011, and in 2008 lived with Strand, C.S. and Cory. When she started living with Strand, Dever was aware that he previously had been convicted of having sex with a minor. Dever had a close and positive relationship with C.S. Dever never observed nor was ever told of any inappropriate sexual conduct between Strand and C.S. Strand was strict, and C.S. frequently complained about not being able to go out to see her friends or her boyfriend. After Strand and Dever broke up, Dever remained in contact C.S. C.S. told Dever that she wanted to live with her mother because her mother would allow her more freedom.

After reporting the abuse on September 23, 2011, C.S. told a social worker in a follow-up interview the same day that her relationship with her mother over the past year was "amazing." In that same interview, C.S. also denied that her father had abused her.

Detective James Kyle testified he interviewed C.S.'s boyfriend Juan in 2011. Juan told the detective that C.S. disclosed she had received an iPod in exchange for performing oral sex on Strand. During C.S.'s 2011 interview, however, she denied ever orally copulating Strand.

Defense investigator James McLean testified L.S.'s guardian, Maryanna, told him that L.S. had reported performing oral sex on Strand on one occasion. Maryanna previously told the police and a social worker that L.S. had disclosed performing oral sex on Strand on two occasions. In her 2002 interview, L.S. denied ever orally copulating Strand.

II

DISCUSSION

A. *The Trial Court Did Not Prejudicially Err in Excluding Evidence of C.S.'s Prior Acts of Dishonesty*

Strand contends the trial court prejudicially erred in sustaining the prosecutor's relevancy objections to questions his defense counsel asked Donna Barnes and Misty Dever about C.S.'s prior acts of dishonesty. We disagree.

1. Relevant factual background

Strand's attorney asked Barnes on direct examination whether she was aware of any instance during the time she lived with C.S. (between February 2010 and February 2011) where C.S. lied to Strand. Barnes responded, "Yeah." Counsel then asked, "What was that occasion?" After the trial court overruled the prosecutor's relevancy objection, Barnes then answered: "Um, one day [Strand] came home from work and he asked me if [C.S.] was on the computer and I said, yeah, and he said, okay. [¶] So he went down and talked to [C.S.], asked C.S., were you on the computer? And she said, no, I wasn't on the computer. [¶] So [Strand] came . . . and got me and said [to C.S.], are you trying to say that Donna is lying. [C.S. replied,] [y]eah, she's lying. So I said, Okay, forget it. I'm going upstairs, [Strand], I'll leave it at that."

Defense counsel then asked, "Any other occasions [*sic*] in our twelve-month period of time?" Barnes started describing an incident in which C.S. did not want to go to a birthday party, saying she wanted to visit a friend instead. Strand told C.S. she could go to her friend's house, but he would call her from the birthday party. When

Strand called, C.S. said, "We're waiting for pizza." Strand felt something was wrong and decided to check on C.S., and "he was right." At this point, the prosecutor objected on the ground that Barnes was giving a narrative answer. The trial court stated it had originally overruled the prosecutor's relevancy objection because it thought the question had to do with the relationship between C.S. and Barnes, which might bear on motive. Based on Barnes's testimony, "this doesn't appear to be within that scope." The court reversed itself, sustained the prior objection, and struck the answer.

When questioning Dever, defense counsel asked, "In your relationship with C.S. did you ever come to learn that she lied to you?" The trial court sustained the prosecutor's relevancy objection. Defense counsel then asked Dever, "Did you ever come to learn that she, C.S., was ever untruthful with her father?" The court again sustained a relevancy objection.

2. Analysis

As an initial matter, we conclude Strand forfeited his claim that the trial court erred in excluding evidence of C.S.'s prior acts of dishonesty by failing to make an offer of proof about the proposed testimony of Barnes and Dever. "In general, a judgment may not be reversed for the erroneous exclusion of evidence unless 'the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.'" (*People v. Anderson* (2001) 25 Cal.4th 543, 580 (*Anderson*), quoting Evid. Code, § 354, subd. (a).) "This rule is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice. [Citations.]" (*Anderson*, *supra*, 25 Cal.4th at pp. 580-581.) Here, after the trial court sustained the prosecutor's objections, defense counsel did not explain the substance or relevance of Barnes's and Dever's proposed testimony. Without an offer of proof, we cannot assess whether the court erred in excluding the proposed testimony or whether any error was prejudicial. This is particularly true with respect to Dever's proposed testimony: whether Dever ever

observed C.S.'s lying to her or to Strand is not in the record. Strand therefore forfeited the issue.

Moreover, even if not forfeited, we conclude there was no reversible error. (See *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 751 [erroneous exclusion of impeachment evidence reviewed for harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836].) Assuming Strand's offer of proof would have shown C.S. had lied on other occasions, we agree with Strand this evidence was relevant to her credibility under Evidence Code sections 780 and 1103.[3] (*People v. Brown* (2004) 33 Cal.4th 892, 908 [evidence relating to witness's credibility is relevant]; *People v. Harris* (1989) 47 Cal.3d 1047, 1080-1081 [statutory limitations on the admission of evidence relevant to a witness's honesty or veracity no longer apply in criminal cases, except for exclusion under Evidence Code section 352].) But excluding this marginally relevant evidence does not require reversal. Whether C.S. lied about going to visit her friend to avoid attending a birthday party was collateral to whether she lied about being the victim of sex crimes. The jury heard evidence C.S. had lied to Strand about not using the computer, and she had falsely denied being abused to Joanna's mother and two social workers. The excluded evidence was therefore cumulative. We conclude there was no reasonable probability the exclusion of this evidence affected the outcome and therefore any error was harmless.

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[3] Under Evidence Code section 780, a "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to," her "character for honesty or veracity or their opposites." (Evid. Code, § 780, subd. (e).) Similarly, under Evidence Code section 1103, "evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted" is generally admissible if "[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, § 1103, subd. (a)(1).)

B. *There Was No Prosecutorial Misconduct.*

Strand contends the prosecutor committed misconduct during closing and rebuttal arguments by suggesting the prosecutor's burden of proof beyond a reasonable doubt is satisfied if a reasonable interpretation of the evidence would point to the defendant's guilt. We disagree the prosecutor's statements can reasonably be interpreted in the manner Strand suggests.

1. Relevant factual background

At the beginning of her closing argument, the prosecutor stated: "Standard of proof is guilt beyond a reasonable doubt. Okay, that's my job, to prove that this defendant is guilty beyond a reasonable doubt. Doesn't mean doubt. It doesn't mean you go through everything looking for doubt. It doesn't mean you hunt for doubt. It means you consider all of the evidence, all of the testimony in this case. Determine what's reasonable. And make a decision, guilty or not guilty, based on all of the evidence in this trial."

At the end of her closing argument, the prosecutor discussed Strand's claim that C.S. and L.S. fabricated the allegations. The prosecutor concluded: "As jurors you consider all the facts. You talk about credibility of the witnesses. Talk about all the evidence you've heard in this trial. You talk about [Strand's] prior sexual history and what it means. You have everything you need to determine what's reasonable and to find [Strand] guilty of the charges."

During rebuttal argument, which focused on inconsistencies in witness testimony, the prosecutor stated: "It's the People's job, my job, to present the evidence, to present the facts, to present what this case is about. It's the judge's job to present the law. And it's your job to determine what happened, what are the facts, what's reasonable. And it's your job to determine guilty or not guilty. And all of the evidence in this case leads you to guilty on all three counts."

Defense counsel never objected to any of these statements.

2. Analysis

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct . . . .'" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) "When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" (*Ibid*.) "'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.]" (*Ibid*.)

As an initial matter, we conclude Strand has forfeited his misconduct claim because he failed to object to the prosecutor's statements. (*Friend*, *supra*, 47 Cal.4th at p. 29.) Nevertheless, in light of Strand's related claim of ineffective assistance of trial counsel, we address the merits of Strand's misconduct claim. (See *People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*) ["'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel.' [Citation.]"].)

A prosecutor is permitted (1) "to argue that the jury may reject impossible or unreasonable interpretations of the evidence," (2) "to urge that a jury may be convinced beyond a reasonable doubt even in the face of conflicting, incomplete, or partially inaccurate accounts, and (3) "to urge that the jury consider all the evidence before it." (*Centeno*, *supra*, 60 Cal.4th at p. 672.) However, "it is error for the prosecutor to suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*." (*Ibid*.)

Centeno is instructive. There, the prosecutor stated in closing argument: "'Is it reasonable to believe that a shy, scared child who can't even name the body parts made up an embarrassing, humiliating sexual abuse, came and testified to this in a room

full of strangers *or the defendant abused Jane Doe. That is what is reasonable, that he abused her.* [¶] Is it reasonable to believe that Jane Doe is lying to set-up the defendant for no reason or is the defendant guilty?' (Italics added.) She continued: 'Is it reasonable to believe that there is an innocent explanation for a grown man laying on a seven year old? No, that is not reasonable. Is it reasonable to believe that there is an innocent explanation for the defendant taking his penis out of his pants when he's on top of a seven-year-old child? No, that is not reasonable. Is it reasonable to believe that the defendant is being set-up in what is really a very unsophisticated conspiracy led by an officer who has never met the defendant or *he['s] good for it? That is what is reasonable. He's good for it*.' (Italics added.)" (*Centeno*, *supra*, 60 Cal.4th at pp. 671-672.) Our Supreme Court concluded that the prosecutor impermissibly diluted the People's burden of proof by "repeatedly suggest[ing] that the jury could *find defendant guilty* based on a 'reasonable' account of the evidence." (*Id*. at p. 673.)

Here, in contrast to *Centeno*, the prosecutor did not tie the concept of reasonableness to the prosecution's burden of proof beyond a reasonable doubt. She did not state it was reasonable to conclude from the evidence that Strand was guilty of sexual abuse. Rather, the prosecutor separated the concepts of reasonable interpretation of the evidence and guilt. She urged the jury to determine *both* what was "reasonable" and whether Strand was guilty or not guilty. The prosecutor did not leave "the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden." (*Centeno*, *supra*, 60 Cal.4th at p. 672.) Because the prosecutor did not commit misconduct, trial counsel was not ineffective for failing to object to the prosecutor's statements during closing and rebuttal arguments. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 616 ["Because there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance."].)

C. *There Was No Cumulative Error*

Strand contends he was denied his right to a fair trial due to the cumulative effect of the purported evidentiary error and prosecutorial misconduct. Because we have rejected Strand's other claims, his claim of cumulative error fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316; *People v. Seaton* (2001) 26 Cal.4th 598, 692.)

D. *Remanded for Resentencing*

The trial court imposed two five-year enhancement pursuant to section 667, subdivision (a). At the time the trial court sentenced Strand, section 1385 did not authorize a trial court to strike or dismiss a section 667 prior serious felony conviction enhancement. (§ 1385, subd. (b); Stats. 2014, ch. 137, § 1; see also *People Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047 [rejecting claim that section 1385 unconstitutionally infringed on power of sentencing court to strike section 667 conviction enhancement].) Effective January 1, 2019, however, SB 1393 amends sections 667 and 1385, deleting the provisions in those statutes which prohibited a trial judge from striking a section 667 prior serious felony conviction enhancement in furtherance of justice. (Stats. 2018, ch. 1013, §§ 1-2.)

Citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), Strand contends SB 1393 applies to him because his judgment is not yet final. He argues this court should remand his case to permit the trial court to consider whether to exercise its newly-granted discretion to strike or dismiss his prior serious felony conviction enhancements. The Attorney General agrees that SB 1393 applies retroactively to Strand's case, and acknowledges that at sentencing, the trial court did not indicate whether it would impose the enhancements if it had discretion to strike them. He concedes that "remand is necessary so the trial court can exercise its discretionary authority under the new legislation."

We agree with the parties. Under *Estrada*, absent evidence to the contrary, we presume the Legislature intended a statutory amendment reducing punishment to

apply retroactively to cases not yet final on appeal. (*Estrada*, *supra*, 63 Cal.2d at pp. 747-748; accord, *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) Remand is appropriate.

III

DISPOSITION

The convictions are affirmed, and the matter is remanded to allow the trial court to consider whether to strike or dismiss the section 667, subdivision (a), enhancement pursuant to section 1385, as amended by Senate Bill 1393.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.